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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1382

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-3a) is reported at 544 F.2d 903. The oral opinion of the district court (App. D, *infra*, pp. 6a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 4a) was entered on November 23, 1976.

A timely petition for rehearing was denied on February 8, 1977 (App. C, *infra*, p. 5a). On March 2, 1977, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including April 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a second trial of a defendant after the court, at the defendant's request, dismissed the indictment during trial on the ground that pre-accusation delay violated the Due Process Clause.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 12 provides in relevant part:

> (b) Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. * * * The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; * * *
>
> * * * * *
>
> (e) A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. * * *

STATEMENT

Respondent, a member of the Muskegon, Michigan, police force, was arrested on January 22, 1975, on a complaint charging him with two drug offenses. The complaint alleged that on September 24, 1974, respondent had sold codeine and that on January 22, 1975, he had sold heroin. He was indicted on these charges on March 5, 1975, and the indictment also charged respondent with distributing cocaine on September 20, 1974. The September 20 transaction formed the basis of Count I, the September 24 transaction the basis of Count II, and the January 22 transaction the basis of Count III. All of the trans-

actions were alleged to violate 21 U.S.C. 841(a)(1).

Respondent moved before trial to dismiss Counts I and II on the ground that the pre-accusation delay violated the Due Process Clause of the Fifth Amendment. The district court held a hearing on this motion and denied it, but without prejudice to renewal at a later time.

Respondent's trial began on December 1, 1975. The evidence presented by the prosecution tended to show that respondent, a member of the narcotics unit of the Muskegon police force, had gone into business for himself and was selling drugs to Robert Jordan, an informant for the Drug Enforcement Administration (Tr. 11-32).

At the close of the prosecution's case, respondent renewed his motion to dismiss Counts I and II because of pre-accusation delay. The court again denied this motion, and respondent presented his defense. Respondent presented evidence tending to show that he dealt with Jordan only in the line of official duties. The theory of the defense was that Jordan had "set up" respondent so that Jordan would be able to traffic in drugs with less risk to himself. Respondent took the stand and testified about the transactions of September 24 and January 22; respondent contended, however, that he could not remember the events of September 20 (Tr. 313-317, 323-324, 338-339, 353, 400-404, 515-519, 536).

After all of the evidence had been received, petitioner again moved to dismiss Counts I and II because of pre-accusation delay. This time the district court granted the motion. The district court

stated that Count I should be dismissed because intentional delay had prejudiced respondent. The prejudice, the court concluded, lay in respondent's inability to recall the events of September 20 (see App. D, *infra*, pp. 6a-7a). The delay was impermissible, the court explained, because it was for the purpose of gaining a tactical advantage over respondent—the delay was intended to allow respondent to commit additional crimes and thus to increase the probability that he would be convicted (*id.* at 8a).[1]

The district court submitted Count III to the jury. The jury returned a verdict of not guilty (App. A, *infra*, p. 2a).

The United States appealed, seeking reversal of the dismissals of Counts I and II. The court of appeals dismissed the appeal for want of jurisdiction (App. A, *infra*, pp. 1a-3a). The court concluded that the Double Jeopardy Clause bars an appeal by the United States from an order entered during a trial dismissing an indictment.

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[1] The district court's reasons for dismissing Count II are not clear. The court stated (App. D, *infra*, pp. 8a-10a) that respondent should have been offered additional assistance in carrying out his police tasks, that the jury would be entitled to agree with respondent's version of events, that respondent might have forgotten important evidence, and that "a compromise verdict • • • may result if [respondent] were to be—had to stand trial all the way on the three counts." Because the reasons for the district court's dismissal of Count II are not clear (the concern about prejudicial joinder would have supported an order granting a mistrial but not an order dismissing the indictment), we do not present in this petition any question concerning Count II of the indictment.

REASONS FOR GRANTING THE PETITION

This case is similar to *United States* v. *Wilson*, 420 U.S. 332, because the district court has dismissed an indictment on the ground of pre-accusation delay and the court of appeals has held that an appeal by the United States is barred by the Double Jeopardy Clause. It is different from *Wilson* in that here the district court, at respondent's insistence, dismissed the indictment before sending the case to the jury. This case therefore presents the important question, not reached in *Wilson*, whether an order dismissing an indictment during trial, for reasons that do not go to the general issue of guilt or innocence, bars a second trial.[*] Cf. *Serfass* v. *United States*, 420 U.S. 377, 394, which reserves the question presented by this case.

The present case presents one facet of a problem that has vexed the courts of appeals and deserves resolution by this Court: When, if at all, may a defendant be prosecuted a second time after the first trial has ended, prior to a verdict by the factfinder, in an order dismissing the indictment? One aspect of this question is before the Court in *Lee* v. *United States*, No. 76-5187, certiorari granted, January 10, 1977, which involves an order entered near the close of trial, at the request of the accused, dismissing the information because of a defect in its drafting.

[*] Since this case does not involve an acquittal, its proper disposition is unaffected by this Court's recent decision in *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977.

A related question is presented in *United States* v. *Sanabria*, 548 F.2d 1 (C.A. 1), petition for a writ of certiorari pending, No. 76-1040, in which the court of appeals held that a second trial always is permitted after a court erroneously dismisses an indictment in mid-trial at the request of the accused.

Many federal courts have considered related problems and come to widely divergent conclusions. *United States* v. *DiSilvio*, 520 F.2d 247 (C.A. 3), certiorari denied, 423 U.S. 1015, like *Sanabria*, holds that a defendant always may be retried after an indictment has been dismissed in mid-trial at his request, and the defect can be cured. *United States* v. *Kehoe*, 516 F.2d 78 (C.A. 5), certiorari denied, 424 U.S. 909, holds that a defendant who intentionally delays until jeopardy has attached making an argument that he has been prosecuted under the wrong statute may not object on double jeopardy grounds to a second trial.

Other cases, however, hold that the Double Jeopardy Clause bars a second trial after any mid-trial order (other than a declaration of a mistrial) that terminates an ongoing trial, despite the fact that the defendant has requested the termination. See *United States* v. *Lucido*, 517 F.2d 1 (C.A. 6) (order terminating a prosecution because of belated suppression of evidence); *United States* v. *Means*, 513 F.2d 1329 (C.A. 8) (order terminating the prosecution because of alleged prosecutorial misconduct and unwillingness to consent to an 11-member jury); *United States* v. *Robbins*, 510 F.2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048 (order dismiss-

ing an indictment because the statute is unconstitutional as applied).

These cases consider the effect on reprosecution of a large number of factors: whether the motion to dismiss the indictment should have been made before trial, whether the district court's decision was based upon evidence heard at trial, whether the decision to terminate the trial involved the general issue of guilt or innocence, and so on. We have argued in *Lee*, however, that a single factor ordinarily should be dispositive: whether the accused has requested or agreed to the termination of the trial, thus abandoning his valued right to receive the verdict of the fact-finder then empaneled.[3]

Our argument in *Lee*, if accepted, would govern this case; respondent twice asked during trial to dismiss Counts I and II of the indictment, and he thus plainly abandoned his right to receive the verdict of the jury on those counts. See *United States* v. *Dinitz*, 424 U.S. 600. If respondent had desired to receive the verdict of the jury on Count I, he could have asked the district court to withhold decision on his motion until after verdict. This would have preserved his chance to be acquitted on the facts, and it would have averted any necessity to hold a second trial on account of the issue of pre-indictment delay. Deferral is the better course (see

[3] See pages 14-27 of our brief in *Lee*, which we have furnished to counsel for respondent.

Fed. R. Crim. P. 12(e));[4] that course was followed in *Wilson* and should have been followed here as well.

If the Court accepts our major argument in *Lee*, then it should grant the petition in the instant case and remand for consideration of the merits of the appeal.[5] If the Court should decide *Lee* on a ground

[4] See pages 40-48 of our brief in *United States* v. *Lovasco*, No. 75-1844, argued March 21 and 22, 1977. (We have furnished to counsel for respondent a copy of that brief.) Rule 12(e) provides that pretrial motions shall not be decided during trial if that decision would adversely affect any party's right to appeal. *Wilson* held that if a court reserves decision until after verdict on a claim of pre-accusation delay, and then sets aside a verdict of conviction, the prosecution may appeal that adverse decision. See also *United States* v. *Morrison*, No. 75-1534, decided October 12, 1976 (prosecution may appeal post-verdict grant of suppression motion). As a comparison of *Wilson* with the decision of the court of appeals in the instant case vividly illustrates, failure once trial has commenced to defer until after verdict a ruling on a motion to dismiss for pre-accusation delay, in the view of at least some courts, eliminates the prosecution's right to appeal.

[5] On the merits, the district court is patently incorrect. A delay of five months between the commission of the crime and the date of the indictment is not inordinately long; respondent's claim of prejudice—simple forgetfulness—has not been accepted as adequate by any court of appeals when the delay is so short; and the district court's finding that the prosecution delayed instituting the prosecution with the intent to gain a tactical advantage over respondent is clearly erroneous. See generally pages 13-40 of our brief in *United States* v. *Lovasco*, *supra*. The district court acknowledged (App. D, *infra*, p. 8a) that the delay in arresting respondent was caused by the continuing nature of the criminal investigation. The court concluded that it was improper to allow respondent to

other than the one we have discussed above, however, then its decision might well leave unanswered one or more of the important double jeopardy issues that have caused such confusion in the lower federal courts. In that event, we believe that it would be appropriate for the Court to grant review here or in another case to resolve these important issues.

We have not opposed the petition for a writ of certiorari in *United States* v. *Sanabria*, *supra*, which involves an erroneous mid-trial order terminating a prosecution because of a supposed deficiency apparent on the face of the indictment. The present case, unlike *Sanabria*, involves a dismissal based on evidence heard at trial; moreover, unlike *Sanabria*, the district court here did not purport to "acquit" the defendant or resolve in his favor any substantive issues of criminal responsibility. The Court there-

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commit additional crimes, and that allowing him to do so was an intentional acquisition of a tactical advantage. But a suspect has no constitutional right to immediate arrest before he can commit additional crimes or provide additional evidence. *Hoffa* v. *United States*, 385 U.S. 293, 309-310. If a trial on multiple crimes would seriously prejudice a defendant, the remedy is a severance under Fed. R. Crim. P. 14, not an order dismissing the indictment. Respondent, however, did not seek a severance. Even if allowing a suspect to commit additional crimes could be thought to entail acquisition of a tactical advantage justifying the dismissal of an indictment, the court should dismiss only the counts of the indictment charging the defendant with the crimes during the period of delay. In the present case, for example, even on the district court's theory, respondent should have been entitled to the dismissal only of Count III, while Count I should have been submitted to the jury.

fore may wish to consider granting review in the present case, in *Sanabria*, or in both, depending upon its disposition of *Lee*.

CONCLUSION

Consideration of this petition should be deferred pending this Court's decision in *Lee*.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

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Attorneys.

APRIL 1977.

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* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Michigan, Southern Division

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Decided and Filed November 23, 1976

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

PER CURIAM. Defendant-appellee was charged in a three count indictment with the distribution of cocaine, codeine and heroin. The counts related to separate occurrences, and because a substantial period had elapsed between the commission of the offenses charged in counts 1 and 2 a motion for their dismissal on the ground of preindictment delay was

filed prior to trial, which was denied without prejudice. At the jury trial the motion was renewed at the conclusion of the government's case, and it was again denied without prejudice. Subsequently, after the defense had presented its case and had rested, the motion to dismiss was renewed and it was then granted by the district court on the basis of preindictment delay and the prejudice the district judge found that it caused to defendant's case. The jury thereafter returned a verdict of not guilty as to count 3, and the present appeal is purported to have been perfected by the government from the order dismissing counts 1 and 2 of the indictment.

18 U.S.C. § 3731 permits an appeal by the United States in a criminal case to a court of appeals from an order of a district court dismissing an indictment as to any one or more counts, but provides "that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." We conclude that this case falls squarely within that exception.

This court has held that appellate review is barred, where as here, a mid-trial ruling by the district judge was based upon facts established by evidence received at trial, *United States* v. *Robbins*, 510 F.2d 301 (6th Cir. 1975), and where a mid-trial decision acquitted the defendant after the court had granted a defense motion to suppress evidence. *United States* v. *Lucido*, 517 F.2d 1 (6th Cir. 1975). See also what has been referred to as the *Wilson-Jenkins-Serfass*

trilogy. (*United States* v. *Wilson*, 420 U.S. 332 (1975); *United States* v. *Jenkins*, 420 U.S. 358 (1975) and *Serfass* v. *United States*, 420 U.S. 377 (1975)).

It is concluded that this Court is without jurisdiction in the premises.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

[Filed Nov. 23, 1976, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that it is without jurisdiction in the premises.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

Issued as Mandate: March 3, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

[Filed Feb. 8, 1977, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

ORDER

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by plaintiff-appellant, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk of Court

APPENDIX D

OPINION FROM THE BENCH

THE COURT: The Defendant has renewed his motion to dismiss Counts I and II based on the delay between the date the offenses are alleged to have occurred and the time he was charged.

I hereby grant the motion to dismiss with respect to Count I.

The Defendant testified with a good deal of specificity as to the occurrence on September 24, 1974, that is, the alleged offense in Count II.

In the Count with respect to Count I involving an alleged offense of September 20, 1974, the Defendant was able to give only a general denial. He could not recall the specifics of what happened on that date. I find the prejudice shown with respect to Count I caused by the preindictment delay was sufficient to result in the dismissal of that Count.

I note that the Defendant's testimony was given before the jury considering his guilt or innocence and not simply presented in separate hearing before me.

In addition, it is not insignificant that Bobby Jordan also had some difficulty remembering the details of the September events, even though he had the benefit of written statements.

Furthermore, the difference in the Defendant's ability to recall events of September 20th and events of September 24th is not without reason. When the Defendant was arrested on January 22, 1975, a Com-

plaint charged him with the offense alleged that occurred—alleged to have occurred on January 22, 1975 and September 24, 1974. The indictment returned by the Grand Jury on the 5th of March, 1975, added the September 20th offense. This additional delay can explain the differences in the Defendant's ability to recall.

The Government is correct in stating that the issue of preindictment delay is one of balancing of interests. However, as stated above, in this case a balance of those interests results in the dismissal of Count I.

The problem is to determine how much, if any, prejudice need be shown, based on the Government's reason for the delay. The quantum of prejudice which need be shown will vary with the circumstances. U.S. versus Marion, cited in 404 U.S. Supreme Court 307, 1971. For delay which is completely unintentional a defendant will have to show at least substantial actual prejudice.

On the other hand, if the delay is caused by the Government, intending to prejudice the Defendant's opportunity to present a defense, only a minimal amount of prejudice, if any, may be required. In between these two extremes will be a variety of instances of intentional but legitimate delay. See, for example, United States versus King, 521 Fed. 2d 356, 6th Circuit case. Each case must be considered on the basis of the totality of the circumstances peculiar to it. U.S. versus Marion, supra.

Here the reason for the delay was principally to gain tactical advantage over this Defendant—to gather more evidence of alleged offenses by him. Obviously the more charges which can be brought against one defendant in one proceeding the more likely the jury will not believe an innocent explanation of a single count or a single charge. Prejudice to the Defendant's ability to present his defense was not intended, but such was the result of Count I.

I want to repeat and emphasize the delay here was the result of the Government's intentional choice, with the principal motive being to gather evidence of further crimes, further alleged crimes by the Defendant in order to gain a tactical advantage at the trial. In such a situation the Defendant may show a lesser degree of prejudice to justify dismissal than where the reason for delay is neutral as respects the particular defendant charged.

I do not decide whether the degree of prejudice shown here would be sufficient for dismissal if the reason for delay was neutral. I hold only that since the delay resulted primarily from an attempt to gain a tactical advantage, this Defendant has presented sufficient proof of prejudice with respect to Count I.

However, evidence of the charge involved in Count I is admissible to the same extent as evidence of any other alleged criminal action by the Defendant. See U.S. versus Jones, the Federal Rules of Evidence for the United States in the United States Courts 405.

The Defendant's denial of ever having distributed narcotics tempers the delay-induced prejudice sufficiently to allow evidence to be received as relevant to the other charges.

I am still a little concerned about September 24th because of some of the totalities of the circumstances in this case. Here is a black officer, the only black officer ever to serve in the unit. He was denied help when again and again he asked for help. That is a jungle out there. The Defendant's theory is that he was left alone, and being left alone he had to devise his own means of surviving in that jungle, and that he was in the process of trying to eliminate what he contended was a big operator, the Government's informant Jordan.

There is evidence in the record from which the jury can conclude that the Defendant's evidence was correct.

One of the problems is, in this case, as I see it, is the very heavy burden which the Defendant had to carry when he was in that jungle. And what—here was an officer. He was brought up from the patrol and tossed into the thicket of a highly sophisticated area of activities. And of all of the things he had to try to remember in that kind of a circumstance he may have forgotten crucial testimony essential to his defense.

I am going to dismiss Count II, as well.

I am not setting a precedent in that regard. I am doing it solely out of the peculiar circumstances of this case. The defendant in this case should not have been out there in that jungle alone. And what I am concerned about is a compromise verdict which may

result if he were to be—had to stand trial all the way on the three counts.

And it is so ordered.

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